

Timelines & Processes for EB-5 Immigrant Investors & Regional Centers

By Joseph P. Whalen (October 23, 2012)

My mind does not work quite the same as many people I encounter but I suppose most people probably think the same about themselves, at least now and again. Anyway, I am going to throw out a few items for you to ponder and then actually try to tie these seemingly disjointed random thoughts together. I shall start with a couple of bits for “background” as well as “atmosphere” or “attitude”. First comes an observation and then an anecdote. Enjoy!

Do you ever get annoyed while driving? That seems like a question that just about everyone who drives would answer in the affirmative. Well, one of my personal pet peeves is those *impatient* drivers whom I categorize in my mind as “Those drivers in a constant *race to the red light!*” If you cannot figure out the correct rate of speed to travel between the intersections of the same daily commute you take, you would appear to have issues of one sort or another but for this discussion, let’s just say that it displays poor planning skills, general impatience, and perhaps a lack of common sense. Please file that tidbit away for later reference.

During my first school year of graduate school, I lived in a very big building on the SFSU campus. It was the Residence Apartments, a 15 story building built into the side of a hill (not uncommon in San Francisco). The main campus side contained the front desk on the first floor. That was the main entrance when coming back from classes or the cafeteria etc. I lived one floor below that main floor in the basement but it was labeled as the mezzanine. My floor was the only occupied floor below the first but there was building access one level further below which lead through the back door to the parking lot and large parking ramp (parking for like 2,000 cars). There was a bank of four elevators, two of which went below the 1st floor, but only one of those went all the way down to the back door. I cannot count how many times I got in the correct elevator to take me to my floor or the back door and everyone else would groan or mutter when the elevator went down from the first floor. These are the people whom I categorize in my mind as “the elevator people” or “*people unaware of the world around them*”. If you live on the 10th floor and repeatedly get into the “down” elevator on the 1st floor, it shows me that you are *unobservant* and *unable to keep track of a crucial detail* that affects you directly and repeatedly.

The attributes displayed in the “race to the red light” and among the “elevator people” are most unfortunate when displayed in a Regional Center Proposal and during the multiple interrelated yet distinct EB-5

application processes. If I were an EB-5 investor, I would not want one of those “elevator people” to be in charge of tracking my documentary evidence over a three to five year period, *which will be required to support my future request to lift conditions (I-829)*.

As the title of this essay indicated, there will be discussion of timelines. Here is where the meat of the article begins. There are at least six (*or up to nine depending on how you count them and how far you get*) distinct basic application processes involved in the EB-5 world ***excluding*** revocations, terminations, certifications, motions and appeals. I will attempt to present a brief overview of the remaining basic processes in an effort to help the reader see what those processes are as well as how and where they are intertwined; or, conversely, see how and where they remain clearly separate and distinct from each other. It is not always easy to do either and therein lay numerous pitfalls for the ***unobservant*** and ***impatient*** among us. Please do not race to the red light in the wrong elevator!

On the next page is chart that attempts to provide some clarity. It may be of most use to those who favor graphic representations of broad multi-faceted concepts that involve multiple layers and steps such as EB-5.

In order to even approach the concept of timelines for various processes, you need a relatively firm grasp of the multiple complex issues. Simply knowing that there are such variables involved helps you to see the “big picture” instead of getting “lost in a maze”. There are two distinct players involved in EB-5. They are the Regional Center and even more important are the individual EB-5 alien investors. The Regional Center sponsor or principal is an “applicant” seeking licensure from USCIS to enable it to offer EB-5 suitable investments vehicles and related services to the individual EB-5 “petitioners” in support of their quests for immigrant status in the United States for themselves and qualifying family members who accompany or follow to join them. Each of these distinct “players” has separate forms, eligibility criteria, and timelines. These players have a symbiotic relationship that must progress in a proper sequence. One may have to wait for the other and one may be hurt by the other when certain events get shuffled out of order and poorly timed or other factors destroy the ability of one’s investment partners to achieve mutual EB-5 success. I feel that one of the most critical factors demanded for success are the Regional Center applicants’ collective knowledge, skills, and abilities (KSAs) because without a solid foundation, disaster awaits a chance to strike.

REGIONAL CENTER PROCESSES				RC AFFILIATED EB-5 INVESTOR PROCESSES				
<i>Seek Initial USCIS Designation as a Regional Center</i>	<i>Make <u>Material Changes</u> to Scope and/or <u>Obtain USCIS Advance Vetting</u> of “Specific Projects” for Investments</i>		<i>Annual Reports (or else)</i>	<i>Seek EB-5 Immigrant Visa Classification</i>	<i>Seek EB-5 Immigrant Visa Or Adjustment.</i>		<i>Seek to Lift Conditions from LPR Status</i>	
<i>I-924</i>	<i>I-924 AMENDMENTS</i>		<i>I-924A</i>	<i>I-526</i>	<i>DS-230</i>	<i>I-485</i>	<i>I-829</i>	
<i>General Predictions based on a General Proposal</i>	<i>Change the RC’s Scope</i>	<i>Dummy I-526 for Specific Project</i>	<i>Both: Use Dummy I-526 to Change Scope¹</i>	<i>Failure to file leads to ITT².</i>	<i>“Approvable when filed” and “eligible at time of filing”.</i>	<i>Abroad, State Dept. Consular Processing</i>	<i>In U.S., USCIS Checks aliens’ admissibility</i>	<i>USCIS Checks for Results</i>
Broadly Define the Scope, and Clearly State and Present the Reasonable Methodologies, Establish the usual Investment Approach(es), and seek Vetting of Hypertechnical Matters <i>such as in</i> the BPs and EAs, and proposed or “draft” standard financial transaction & limited partnership documents. <i>Prove your KSAs!</i>	Place; NCE ³ type(s); JCE ⁴ type(s), <i>show ability</i> to write BP⁵ and EA , show nexus , and use valid data. <i>Got the needed KSAs?</i>	Highly detailed BP & EA for a Specific Project. Shows real docs to be used with aliens. Advance vetting ⁶ <i>prima facie</i> evidence!	Use a REAL project to expand the RC scope as to place, NCE, JCE, docs, and/or methods for counting jobs.	USCIS wants to track your progress. They will kick you out of the Program if you fail to do as planned or merely fail.	Must show sufficient lawful funds, jobs have already been created OR submit a plan to create 10 jobs (per EB-5 investor). RC should supply BP, EA, and have used USCIS approved transaction docs.	2-year clock begins when the EB-5 investor gets CBP stamp on Imm. Visa (IV) in his or her passport upon first entry with IV and MUST enter before or with his or her family!	2-year clock begins with USCIS approval stamp is placed on the I-485. The actual investor MUST be approved before or with his or her family!	Final project implemented may vary from plan. In order to count indirect jobs the final project must not stray outside the scope of the Regional Center, i.e. approved operational parameters.

¹ Depending on depth and breadth of the change and amount of vetting required, adjudication delays can jeopardize the viability of **that Specific Project**.

² ITT = Intent To Terminate. 8 CFR § 204.6(m)(6) calls for an ITT to the RC if I-924A is not filed as required, *or for cause*.

³ NCE = New Commercial Enterprise. It is most often a Limited Partnership.

⁴ JCE = Job Creating Enterprise. These are the “kinds of commercial enterprises that will receive capital from aliens” for the purpose of creating jobs.

⁵ BP = Business Plan. Initially may be an “archetype” or “hypothetical” in the “general proposal” but later gets refined to meet *Matter of Ho* requirements. BP supplies info for the EA = Economic Analysis utilizes the approved methodology that USCIS accepted as reasonable BUT it must be executed properly. USCIS will check the assumptions, data categories, and sources of input for validity. Together they must show a sufficient nexus (palpable connectivity) between EB-5 funds and claimed jobs.

⁶ Seek a Provisional Approval for the evidence and the Specific Project. Lifting of conditions is contingent on following through & results.

According to the law, in order for any investor to enjoy the benefits of the *EB-5 Regional Center Program*⁷ (?formerly "*Pilot*" *Immigration Program*?) he or she must be *affirmatively affiliated* with an approved Regional Center. That tells us that the Regional Center must be approved before it can accept any EB-5 investors. Far too many Regional Center hopefuls try to "jump the gun" and associate with hopeful EB-5 investors prematurely. That situation is particularly bad for the alien investors IF they must rely on "indirect jobs" in such a venture. It is a precarious position for the Regional Center as well because it can become known as incompetent from the start and come to a quick demise if they ever finally get USCIS Designation.

An *Initial I-924* which is merely seeking basic USCIS Designation should come first. There are differing approaches to the initial designation application. Some Regional Center applicants seek a very large scope right off the bat. The larger and more complex the initial designation application is, the longer the adjudication is likely to take. A lengthy initial adjudication can be but does not have to be detrimental to any *Specific Project* included up front. As the EB-5 stakeholder community is coming to know first-hand, everything is examined very carefully and on a case-by-case basis based on a thorough examination of the evidence in the individual record of proceeding. As the stakeholders are also coming to learn, if you want to use a mix of conventional financing or "bridge loans" in order to get started and plan to replace that funding with EB-5 money, you have to specifically state that eventuality up-front at or before groundbreaking or **very** soon thereafter. Completed projects cannot be re-financed or "bought out" by EB-5 money. Where is the "at risk" aspect of the investment which justifies the immigrant visa if one can simply usurp the efforts of someone else's completed development project? There is zero risk taken to create new jobs and no jobs can be justifiable found⁸ to be directly or indirectly attributable to funds used merely for re-financing or buying out a completed project. It makes no sense.

⁷ 126 Stat. 1325, Pub. L. 112-176, Section 1, "Reauthorization of **EB-5 Regional Center Program**" (1) struck the word pilot from the authorizing statute and (2) extended it through September 30, 2015. I believe Congress changed the name from Pilot Program to EB-5 Regional Center Program, this is open to debate. Regardless, the statutory provision has been codified as a Note to 8 USC § 1153, which is the code equivalent to INA § 203 Allocation of immigrant visas. EB-5 is found at INA § 203(b)(5) [8 USC § 1153(b)(5)].

⁸ This would be a *finding-of-fact* by USCIS and while AAO could review that finding *de novo*, nobody else could. An IJ, the BIA or Federal Judge would be restricted to a *review for clear error* for all practical purposes because it is so complex. USCIS will have to carry its "burden of proof" only by the "preponderance of the evidence" standard in associated Removal Proceedings instead of the "clear and convincing" standard used in other Removal Proceedings. 8 CFR § § 216.6 and 1216.6 (d)(2) "...In deportation proceedings, the burden shall rest with the Service to establish by a preponderance of the evidence that the facts and information in the alien's petition for removal of conditions are not true and that the petition was properly denied."

What can the results be for your initial designation? There are different possible answers to that question but here are some likely ones. The new Regional Center might be approved for a broad scope that will allow it to search for suitable projects to develop further in Dummy I-526s as I-924 Amendments. A broad designation can be attained if the Regional Center makes a strong showing of its knowledge, skills, and abilities (KSAs) in its identified areas of interest, reasonable methodologies well-suited to the tasks at hand which, the Regional Center has shown it can properly utilize, and general competence to fulfill its obligations to EB-5 investors and meet the broader Program goals. However, other Regional Centers have taken the approach of narrowly focusing their scope and concentrating on a “shovel ready” project from the start. I have deep concerns that such an approach is dangerous if it is too narrow because if it fails, the Regional Center will likely never recover.

As mentioned, some Regional Centers will tell USCIS of their intention to follow up their broad approach by filing much more highly developed Dummy I-526s as I-924 Amendments supported by *Matter of Ho-* compliant business plans and very detailed economic analyses in an effort to obtain a *Provisional Approval* for each *Specific Project*. The byproduct of each *Provisional Approval* will be a packet of *prima facie evidence of eligibility* to provide to the EB-5 investors in support of their individual I-526 visa petitions. I advocate using this approach.

Any initial designation *regardless of approach taken* and Dummy I-526s, *if any*, will take their sweet time. However, I would expect USCIS, in short order, to become increasingly more efficient in expeditiously adjudicating well-prepared follow-up Dummy I-526s following a ***thorough initial vetting*** which had concentrated more on the Regional Center’s KSAs, broad⁹ yet well-defined scope, and superbly presented reasonable methodologies, if Regional Center applicants increasingly moved into that mode of operation.

Moving on now to the EB-5 investors, they have quite different legal concerns and processes than the Regional Center applicants. They have three different stages at which they must file forms. Their first form is the I-526, Immigrant Petition by Alien Entrepreneur. It is a preference visa petition and as such is subject to the same basic requirement as any other preference visa petition, the alien beneficiary, or in this case, alien

⁹ A broad but focused scope defined in a General Proposal is very different from a “vague” undefined sloppy proposal, and don’t dare confuse the two.

self-petitioner, must be eligible for the benefit sought at time of filing the visa petition. If you look at the statute and regulations, the alien investor needs to show sufficient lawful funds and either proof of jobs already created or a plan to do so. The vast majority of EB-5 investors put forth a plan. The Regional Center affiliated investor gets their plan and the associated supporting reasonable methodology from the Regional Center. It may take as little as one month or as much as six months, on average, but as is often the case these days, it is likely to take three months or less based on volume of petitions in the queue for the I-526 to be approved, if based on an easily approvable packet of Regional Center supplied evidence. If escrow has been used, I-526 approval would usually be the trigger that allows the funds to be released.

The alien with an approved I-526 will then have to seek an actual immigrant visa through a Consulate abroad by filing form DS-230 with the State Department or if lawfully present inside the United States, the alien has the option of filing form I-485 with USCIS to obtain an adjustment of status without having to depart the U.S. The processing times for each process is highly variable and dependent on the workload at the office handling the case. That said, Consular Processing is often slightly faster than adjustment of status processing. When USCIS actually approves the adjustment application, the alien's conditional status begins as so does the two-year period of that conditional status. In other words, the clock begins to tick on towards the I-829 filing deadline. However, even though Consular Processing may be quicker, it does not immediately start the alien's conditional status or the clock. The alien will be issued an immigrant visa and will have six months to travel to the U.S., get processed by CBP upon entry and start their conditional status and their two-year clock.

It is important for the Business Plan Writer for the Regional Center package to understand the actual time available for the schedules they present in their plans. This is so because it is that business plan which will then be used by the Economist to derive input for use in the approved model to predict job creation for the project. The left hand and the right hand have to know what the other is doing in order to convince USCIS to approve the plans and the petitions supported by them.

The last process that the alien investor will have to endure is the I-829, Petition by Entrepreneur to Remove Condition. It is at that point that the alien will be required to submit corroborating evidence to substantiate the results of the investment efforts. In that the "kinds of commercial enterprises" that might be the object of the investment are widely variable, the evidence is highly variable. It is in the I-829, that the alien will be required to meet a "back-end burden of proof". While a plan was put forth up-front and it was accepted as

reasonable and likely to produce enough jobs if successful, the alien was not absolutely tied to the original plan. Changes happen in life and can happen in the best of plans as well. That said, it is the results that really count in the I-829 adjudication. There are some restrictive factors for Regional Center affiliated investors. They can only count indirect jobs based on the USCIS approved reasonable methodologies and must otherwise remain within the approved scope of the Regional Center. Another key factor is the location of the ultimate investment. If the investment began in a TEA, any changes in location within the approved Regional Center limited geographic area must be inside the same or another approved TEA in order to maintain eligibility to stay at the reduced TEA rate.

As was mentioned above, the alien investor will need to submit evidence to support job creation etc. Again, it will fall on the shoulders of the folks running the Regional Center to gather the required evidence in most if not all situations. In order to hand over that evidence, the Regional Center will need to track and gather the appropriate documentation over a long period of time. In order to track and gather appropriate evidence, one has to know what they actually need to prove. In order to know what you have to prove, you have to isolate the specific facts that will support the “predictions” made up front which were based on stated assumptions in the business plan and accompanying economic analysis. It is exceedingly difficult to try to figure out all the minute details and the required evidence at the last minute in hindsight. It is much easier to figure in advance what you will need to track rather than try to “find” information and documents years after the fact and at the last minute. Lastly, it will also be helpful for the Regional Center to track as much useful data and evidence as possible to facilitate its own annual reporting to USCIS on the form I-924A. A word of caution, the more simultaneous projects that a Regional Center has going only increases data tracking so it is best to be methodical and systematic from the very start because there is no better time than the present to plan for the future.